Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

PETER BALODIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SUPREME COURT OF PENNSYLVANIA FAILED TO FOLLOW *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984), WHICH IS THE LAW IN PENNSYLVANIA ON INEFFECTIVENESS PURSUANT TO *COMMONWEALTH v. PIERCE*, 515 Pa. 153 (1987).

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STATEMENT OF JURISDICTION

28 U.S.C. § 2101(d) states that "the time for appeal or application for writ of certiorari to review the judgment of a state court in a criminal case shall be prescribed by rules of the Supreme Court." United States Supreme Court Rule 13 provides:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review.

On February 24, 2000, the Supreme Court of Pennsylvania reversed the Superior Court of Pennsylvania, remanded the matter for a new trial, and, found trial counsel ineffective "for failing to preserve for appellate review an objection to the admissibility of testimony by the Commonwealth's expert witness, which improperly bolstered the credibility of the victim" (February 24, 2000 Supreme Court of Pennsylvania Opinion at 1a-2a, App. A):

> There is no doubt that an attack on Jimmy's credibility was trial counsel's strategy, and we agree that the strategy was reasonably intended to effectuate appellant's interests. Further, we acknowledge that counsel pursued this strategy knowing full well that by attacking the findings Ms. Sobel made in her initial report, the Commonwealth would rehabilitate her by reference to the second and third reports. In fact, trial counsel wanted the Commonwealth to admit all three reports as that further illustrated for the jury that Jimmy fooled the expert and could not be taken at face value as a witness. (N.T. 175-178). However, we cannot agree that failure to preserve the objection to Ms. Sobel's expert testimony on the general characteristics of abused children, which testimony directly bolstered the credibility of Jimmy, was part of that strategy.
>
> * * *
>
> Accordingly, we find that appellant has demonstrated that trial counsel's failure to preserve the claim that Ms. Sobel's testimony was inadmissible caused appellant prejudice. *Pierce*.

(February 24, 2000 Supreme Court of Pennsylvania Opinion at 13a, 16a, App. A). Previously, on May 8, 1998, the Superior Court of Pennsylvania affirmed the April 5, 1991 Judgment of Sentence imposed by the trial court.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI of the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense.

STATEMENT OF THE CASE

On September 12, 1990, the respondent, Peter Balodis, the owner of the Harley Hotel, in Montgomery County, Pennsylvania, was tried by jury, presided over by the Honorable Paul W. Tressler, of the Court of Common Pleas of Montgomery County, Pennsylvania, and convicted of Involuntary Deviate Sexual Intercourse, Statutory Rape, and Corruption of the Morals of a Minor. The respondent was represented by trial counsel, Wallace Bateman, Esquire.

The respondent's trial counsel filed written post-trial motions on September 21, 1990. On February 11, 1991, post-trial motions were denied. John P. Karoly, Esquire, then

entered his appearance on March 19, 1991 and represented respondent at sentencing.

On April 5, 1991, respondent was sentenced to a total of 11 to 24 years incarceration comprised of a sentence of eight (8) to sixteen (16) years for Involuntary Deviate Sexual Intercourse and a consecutive three (3) to eight (8) years sentence was imposed for Statutory Rape. Sentencing counsel filed an unsuccessful motion to modify the sentence on April 23, 1991 and then filed a timely appeal to the Superior Court of Pennsylvania on May 8, 1991, which was dismissed on August 24, 1992 for failure to file the respondent's Brief.

The respondent's present counsel, Norris E. Gelman, Esquire and Harvey Sernovitz, Esquire, filed a Post Conviction Relief Act petition seeking the right to appeal, *nunc pro tunc*, based on the ineffectiveness of original appellate counsel in failing to timely file a brief before the Pennsylvania Superior Court. Present counsel delineated the issues of ineffectiveness of counsel to be determined on appeal in the respondent's November 5, 1996 Post Conviction Relief Act Petition and Pa. R.A.P. 1925(b) Statement of Matters Complained of on Appeal. The trial judge held a hearing on May 12, 1997, during which prior trial and appellate counsel testified.

On June 23, 1997, the trial court entered an order granting respondent the right to appeal *nunc pro tunc* but did not rule on the issues presented for appeal pursuant to the Superior Court of Pennsylvania's holding in *Commonwealth v. Miranda*, 296 Pa. Super. 441, 442 A.2d 1133 (1982) (*en banc*). On May 8, 1998, the Superior Court of Pennsylvania affirmed the April 5, 1991 judgment of sentence. On September 24, 1998 the Supreme Court of

Pennsylvania granted the respondent's Petition for Allowance of Appeal. On February 24, 2000, the Supreme Court of Pennsylvania reversed the May 8, 1998 Order of the Superior Court of Pennsylvania.

The victim of the crimes for which respondent was convicted, J.R., had resided at the Harley Hotel with his mother in 1988 and 1989. On February 16, 1989, J.R. moved into a foster home operated by Sheila Lapinski. While living with Mrs. Lapinski, J.R. and other foster children were shown a film dealing with good touch and bad touch. After viewing the film, J.R. revealed to Mrs. Lapinski that he had been repeatedly molested while residing at the Harley Hotel, naming respondent as one of the people who had molested him. Mrs. Lapinski reported the incident to Montgomery County Youth Services.

Maddi-Jane Sobel, a clinical social worker employed on a contract basis by Montgomery County Youth Services, interviewed J.R. on August 1, 1989 about his allegations of sexual abuse. During that interview, J.R. did not come forth with information regarding his sexual abuse.

Sobel interviewed J.R. again on November 28, 1989, after he had been living with Lapinski for a short period of time. At this second interview, J.R. detailed the sexual abuse he had received from a number of men while living at the Harley Hotel.

Sobel conducted a third interview of J.R. on February 13, 1990, at which time J.R. revealed that he was regularly sexually molested in a room at the Harley Hotel by a number of men. J.R. named respondent as one of those men during the course of this interview. J.R. also revealed that he saw respondent pay his mother after respondent had molested him.

At trial, on September 11 and 12, 1990, the prosecution offered as evidence the testimony of J.R., Mrs. Lapinski, and Detective Hart to whom he related his traumatic experiences. Dr. Steven Shapiro also testified that his examination of J.R. revealed a scar on J.R.'s anal sphincter and tightness of the anal sphincter. Dr. Shapiro stated that the results of the examination comported with J.R.'s complaints of repeated sexual abuse.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF PENNSYLVANIA FAILED TO FOLLOW *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984) WHICH IS THE LAW IN PENNSYLVANIA ON INEFFECTIVENESS PURSUANT TO *COMMONWEALTH v. PIERCE*, 515 Pa. 153 (1987).

The Supreme Court of Pennsylvania announced in 1987 in *Commonwealth v. Pierce*, 515 Pa. 153 that courts of the Commonwealth of Pennsylvania were to follow the holding of *Strickland v. Washington*, 466 U.S. 668 (1984) to evaluate the effective assistance of counsel. The Supreme Court of Pennsylvania did not follow the holding of *Strickland v. Washington*, 466 U.S. 668 in this case. The Court in *Williams v. Taylor*, 68 USLW 4263, 120 S. Ct. 1495, __ L. Ed. 2d __ (2000) held that the *Strickland* test provides sufficient guidelines for resolving virtually all ineffective assistance of counsel claims.

The respondent alleged that trial counsel was ineffective for failing to preserve his objection to the testimony of Maddi-Jane Sobel. Under federal and state law, counsel is

presumed effective and the burden lies on the respondent to prove otherwise. To do so, the respondent must prove, among other things, that trial counsel had no reasonable or rational basis in serving his client by making his chosen decisions during trial. The test is not whether trial counsel made the best available decision, but whether the decision is a rational one under the circumstances.

In evaluating Sobel's testimony, trial counsel testified that he recognized inconsistencies in the victim's interviews with Sobel, and attempted to reveal inconsistencies in the versions that the victim related to Sobel. These inconsistencies, he hoped, might persuade the jury that the victim was not a credible witness and might cause the jury not to believe his testimony. Trial counsel cross-examined the victim and the other witnesses about the inconsistencies in the victim's statements.

Based on this, trial counsel had a rational basis for believing that Sobel's testimony was admissible and admission of her testimony was an integral part of his trial strategy. Therefore, because there is a rational basis for this decision, trial counsel was constitutionally effective.

"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable profession assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. at 689. *See also Burger v. Kemp*, 483 U.S. 776, 794-95 (1987).

The Supreme Court of the United States established the criteria that respondent must demonstrate to meet that burden:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687.

A defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*.

The respondent has contended that the testimony of Maddi-Jane Sobel, a clinical social worker, was inadmissible because it allegedly bolstered the credibility of the testimony of the victim, J.R. Sobel's testimony was offered as factual

evidence. She was the first person to interview J.R. to elicit the facts surrounding the sexual abuse that he had suffered at the hands of the respondent and the result of that interview was necessary information for both the prosecution and the defense. The purpose of Sobel's testimony was to convey to the jury what J.R. had told her during three interviews.

During cross-examination of Sobel, trial counsel requested that Sobel explain the victim's lack of allegations during her first interview with him. On redirect, the prosecution asked Sobel whether her opinion of the validity of the victim's allegations changed during the second and third interviews. Trial counsel objected to this questioning, and in explaining his reasoning for overruling the objection, the trial court stated to the jury:

> THE COURT: Let me explain one thing further.
>
> > There was a question asked by defense counsel, with respect to the first report, and an opinion was requested. I will allow you [the prosecutor] to ask whether or not that opinion has been changed, but, again, I am emphasizing that her opinion is not what's important. The only person that can determine whether or not there was a child abuse situation here is you, and you also have to determine who did it. You are the ones who make that decision.

(N.T., Trial, 9/12/90, p. 123). Any error was cured by the above admonition.

At the close of the prosecution's case and when the jury was absent, the trial court further explored trial counsel's decision to allow Sobel's testimony for the record:

THE COURT: There is one other issue that I would like to address. There were statements made by Maddi-Jane Sobel, about her opinion, with respect to the first interview, and then, I believe, that was brought out on cross. Then, on redirect, there was a question about the second or third interviews, and what her opinion was on that, as far as the actual issue of guilt or innocence — not the guilt or innocence of this defendant, but whether or not an abuse had occurred.

Ordinarily, I would not allow that in. I allowed it in because of the fact that the defense — and we discussed this before we came into the room, before Maddi-Jane Sobel even took the stand — and I only allowed her opinion in because of the fact, from the Commonwealth's standpoint, because of the fact that it had been brought in by the defense.

I know you told me your trial strategy — and I can't disagree with it — but, I think you ought to put that on the record, because it wasn't on the record before she testified.

MR. BATEMAN: Yes, sir. I would be happy to do that. If I may first say, I understand that the Commonwealth did not introduce that, and I took it upon myself to elicit that opinion testimony. The reasons are, at the first interview, the expert witness, if you will, wrote a report indicating that she believed this young man . . .

Her report said, the first time, that she believed him, when he said that he only witnessed

his mother with other men. He did not tell her that he had been sexually assaulted.

The second and third interviews, he indicated that other men had sexually assaulted him.

My reason for that is, when she says, "I believed him, that he only saw it," is to show to this jury that he was capable of convincing an expert in this field, that it didn't happen, or at least convincing her that all he did was to witness this event or these events.

My strategy, in this case, I don't think it is any secret at this point. I am challenging the credibility of this witness. When he goes to an expert in the field of child sexual abuse, and tells her that all he did was witness these events, and she writes in her report, "Therefore, I do not believe that this child was directly sexually abused," I think that is highly relevant in challenging his credibility.

I understood what I was doing — if I could place that on the record — that that would open the door for the Commonwealth to introduce her opinion as to the second and third interview, and I fully intend to argue to the jury that she believed him both times — all three times — even though his stories, in my judgment, were different.

THE COURT: Therefore, since she did not believe it happened once, even if she did believe it happened later, your argument is going to be,

> as far as an expert was concerned, he was, number one, capable of fooling her — if I can use that term — or, the alternative, even she had reasonable doubt?
>
> MR. BATEMAN: Yes, sir. Precisely. I fully intend to argue that to the jury.
>
> THE COURT: All right.
>
> MR. BATEMAN: And I will say, right now, that I believe that was the correct strategy under the circumstances.

(N.T., Trial, 9/12/90, at 175-78).

The trial court commented on the victim's testimony and Sobel's testimony while instructing the jury:

> Now, you have heard evidence that the victim — the alleged victim in this matter, J.R., made statements on an earlier occasion, that were inconsistent with the statement he gave here in court. You have to decide whether or not that statement is true. This evidence may be considered by you for one purpose only, that is, to help you judge the credibility and the weight of the testimony given by J.R., as a witness in this trial. You may not regard evidence of a prior inconsistent statement as truth of any matter asserted in that prior statement. Of course, as I said before, credibility means believability. You have also heard evidence that J.R. made statements on an earlier occasion, that were consistent with his testimony here in court. Again,

> you have to decide whether or not that, in fact, occurred. This evidence may be considered by you, again, for one purpose only, that is, to help you judge the credibility and weight of the testimony given by J.R. as it relates to this trial. You may not regard evidence of a prior consistent statement as proof of the truth or any matter asserted in the statement, but only as to whether or not it adds credibility to the in-court statements that you heard.

(N.T., 9/12/90 at 222-23).

> I want to make a special comment about Maddi-Jane Sobel's testimony. I believe I mentioned this before, but, I want to mention it again. During the course of the direct examination and the course of cross-examination, questions were asked, relating to whether or not she believed that J.R. had been sexually abused. That opinion which was rendered cannot be considered by you as substantive evidence, and cannot be considered by you as opinion evidence on her behalf. You are the people who have to decide that issue. That's the real issue that you are here whether or not he was abused, and by whom. You have to decide that issue. So, her opinion, as far as it relates to whether or not an abuse occurred or did not occur, is not binding upon you, and is not an opinion that you should consider as an expert, because, in the area of the abuse itself, you are the ones who have to decide whether or not the abuse occurred, and, if it did occur, who committed the abuse.

(N.T., 9/12/90, at 224-25).

Eliciting Sobel's testimony about the three interviews was trial counsel's strategy for revealing to the jury the inconsistencies in J.R.'s story. At the Post Conviction Relief Act hearing trial counsel stated:

> As I recall the testimony, from a strategic standpoint we allowed . . . the evidence in. I wanted her entire report in because I thought that would show more inconsistencies of the victim, and Mr. Balodis and I certainly discussed that . . . and we wanted all three of those interviews in because there was an apparent inconsistency.

(N.T., PCRA, 5/12/97, PCRA Hearing, at 99).

While there was an arguable claim in Pennsylvania at the time of trial that expert testimony was inadmissible if used to only bolster the credibility of a witness, based on *Commonwealth v. Dunkle*, 385 Pa. Super. 317, 561 A.2d 5 (1989), trial counsel was within the bounds of reason and rationality to conclude that Sobel's testimony was admissible for other reasons, not to bolster the victim's credibility, but to attack it. The Superior Court of Pennsylvania *Dunkle* case, which was the law at the time of trial here, held that the court must determine the purpose for which the testimony in question was offered, and if not offered solely to sustain the credibility of the victim, then it was admissible. Sobel's testimony was not offered to bolster the credibility of J.R. In fact, Sobel's testimony gave trial counsel the opportunity to reveal to the jury the inconsistencies in J.R.'s three versions along with his testimony at the preliminary hearing and to suggest to the jury that J.R. was cunning enough to fool an expert, so much so that even Sobel concluded in her first report after first speaking with him that she did not

believe there was sexual abuse. During the PCRA hearing on May 12, 1997, trial counsel stated:

> I argued to the jury that he was so convincing that he was able to con [Sobel] as an expert . . . because she took a report and didn't believe he was abused the first time she interviewed him. She was [convinced] the second and third times. I think by doing that I may have opened the door to allowing the other evidence in and we knew that . . .

(N.T. 5/12/97, at 99-100).

The case against the respondent was strong. In addition to the victim's testimony, the Commonwealth offered testimony of other people to whom J.R. related the details of the sexual abuse he had suffered at the hands of respondent.

Among those witnesses was Dr. Steven Shapiro, who testified that he examined J.R. after the sexual abuse was first reported to Mrs. Lapinski, had observed a scar on J.R.'s anal sphincter and that upon examination, the muscles were extremely tight. (N.T., Trial, 9/11/90 pp. 179-206). Dr. Shapiro further testified that the examination of J.R. revealed symptoms that were consistent with J.R.'s assertion of repeated sexual abuse.

The respondent did not satisfy the necessary elements to establish ineffectiveness of counsel. Trial counsel had a rational basis and purpose in believing the testimony was useful to the respondent. It can be seen from the testimony at trial that counsel strategically used Sobel's testimony to

attack the credibility of the victim. (N.T., 9/11/90, at 175-78). There is no showing of prejudice, in that if counsel had not taken the course he did, there is not a reasonable probability that the result of the case would have been different. In fact, Sobel's testimony became an integral part of trial counsel's defense strategy.

> . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant, Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.
>
> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of

> counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. at 688-89.

A new trial was not warranted because the respondent did not establish that trial counsel was ineffective in allowing Sobel's testimony. It was a calculated decision made by trial counsel after consulting with the respondent to cross-examine Sobel to show to the jury that J.R. was lying and to show that the respondent did not commit the sexual acts with which he was charged.

The Supreme Court of Pennsylvania erred by failing to follow the law on ineffectiveness set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and, thereby, erred in awarding a new trial to the respondent. For these reasons, the petitioner requests that the Supreme Court of the United States grant this Petition for Writ of Certiorari.

CONCLUSION

Wherefore, based upon the foregoing, the petitioner respectfully requests that the Supreme Court of the United States grant this Petition for Writ of Certiorari and reverse the Supreme Court of Pennsylvania.

Respectfully submitted,
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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED, DECIDED AND ENTERED FEBRUARY 24, 2000

[J-20-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 144 M.D. Appeal Docket 1998

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PETER BALODIS,

Appellant

Appeal from the Order of the Superior Court entered on May 8, 1998 at No. 2840PHL97, affirming the judgment of sentence imposed on April 5, 1991 of the Court of Common Pleas of Montgomery County, Criminal Division, at No. 162-90.

ARGUED: February 2, 1999

OPINION

MR. JUSTICE CAPPY
DECIDED: February 24, 2000

The question before the court is whether trial counsel was ineffective for failing to preserve for appellate review

an objection to the admissibility of testimony by the Commonwealth's expert witness, which improperly bolstered the credibility of the victim. For the following reasons we find that counsel was ineffective, and that accordingly, the decision of the Superior Court must be reversed and the matter remanded for a new trial.

The instant case arose following the allegations of ten year old Jimmy Rosser that he had been sexually molested by appellant on numerous occasions in 1988 and 1989. According to Jimmy, the acts of sexual abuse took place at the Harley Hotel in Montgomery County, Pennsylvania. (Notes of Testimony "N.T." p. 21). At the time these acts allegedly occurred, appellant owned the hotel and Jimmy resided there with his mother and younger brother. (N.T. pp. 19-20). Some time in 1989 Jimmy was moved to a foster home. While in the foster home, Jimmy watched a film on "good touch bad touch". (N.T. p. 27). After the film, several of the other foster children admitted being victimized by "bad touch". Jimmy told his foster parents that he had also been sexually abused. (N.T. p. 27). Jimmy's foster parents notified Montgomery County Children and Youth Services (CYS) of the alleged abuse. (N.T. p. 136). At the request of CYS, Maddi-Jane Sobel, a clinical social worker, interviewed Jimmy. (N.T. p. 103). In the initial interview on August 1, 1989, Ms. Sobel concluded that Jimmy had not been abused. (N.T. p. 104). Ms. Sobel interviewed Jimmy again on November 28, 1989 after which she concluded that Jimmy had been sexually abused. (N.T. p. 105). Jimmy was then interviewed by Detective Hart of the Montgomery County Detective Bureau in connection with a criminal investigation regarding the allegations of sexual abuse. (N.T. p. 148). Ms.

Appendix A

Sobel interviewed Jimmy a third time on December 19, 1989 and additional details of Jimmy's sexual victimization were revealed. (N.T. p. 114).

As a result of Jimmy's revelations regarding the activities of appellant at the Harley Hotel, appellant was brought to trial, before a jury, on charges of involuntary deviate sexual intercourse, statutory rape and corruption of a minor.[1] During the course of appellant's trial Ms. Sobel was permitted to testify, over the objection of defense counsel, to the general characteristics of child sexual abuse victims as those traits relate to a failure to promptly report abuse, and after the abuse is reported, to reveal the details of the abuse in stages. (N.T. p. 106). The jury returned its verdict of guilty on all counts on September 12, 1990. Trial counsel prepared post-trial motions, which were filed on January 24, 1991. The post-trial motions did not preserve the objection, referenced above, to the expert testimony of Ms. Sobel. Post-trial motions were denied on February 11, 1991.

On March 19, 1991 new counsel entered his appearance on behalf of appellant. On April 5, 1991 appellant was sentenced on all counts to a total of eleven (11) to twenty-four (24) years of incarceration. A timely notice of appeal was filed from the judgment of sentence. On August 24, 1992 the Superior Court dismissed the appeal for failure of counsel to file a brief. Present counsel entered his appearance on December 4, 1996. Appellant then filed a petition under the Post Conviction Relief Act, 42 Pa.C.S. § 9541 et seq., seeking reinstatement of the right to a direct appeal, nunc pro tunc,

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1. See, 18 Pa.C.S. §§ 3123, 3122 and 6301, respectively.

and raising issues regarding the ineffectiveness of trial counsel. *Commonwealth v. Lantzy*, __ A.2d __ (Pa. 1999). (PCRA is proper procedure for obtaining reinstatement of direct right of appeal nunc pro tunc).

After a hearing on the post-conviction petition, the trial court found appellate counsel ineffective for failing to submit a brief to the Superior Court, and accordingly, granted appellant the right to proceed with his direct appeal, nunc pro tunc. By obtaining nunc pro tunc relief, appellant stands as if the appeal were timely brought following the judgment of sentence. Thus, appellant correctly raises the ineffectiveness of trial counsel, without the necessity of layering the claim referencing the conduct of prior appellate counsel whose representation had been found ineffective. It is as if the actions taken by first appellate counsel had not occurred. *See Commonwealth v. Kenney*, __ A.2d __ ((J-201-97) decided 5/28/99). In its opinion reinstating appellants right to a direct appeal, the trial court declined to address the merits of the claims raised regarding trial counsel's ineffectiveness. The Superior Court reviewed the ineffectiveness claims as to trial counsel and denied relief, affirming the judgment of sentence. This court then granted a Petition for Allowance of Appeal, limited to appellant's allegation of ineffectiveness regarding the omission of a meritorious issue by trial counsel in post-trial motions.

The burden of establishing a claim of counsel's ineffectiveness is on the appellant, as counsel is presumed effective. *Commonwealth v. McNeil*, 487 A.2d 802 (Pa. 1985). In reviewing an ineffectiveness claim, the threshold inquiry is whether the issue/argument/tactic which counsel

has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Commonwealth v. Durst*, 559 A.2d 504 (Pa. 1989). Should this threshold be met, we must then apply the "reasonable basis" test to determine if the course chosen by counsel was designed to effectuate his client's interest. *Commonwealth ex rel. Washington v. Maroney*, 235 A.2d 349 (Pa. 1967), *overruled on other grounds*, *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). Application of the "reasonable basis" test pertains to appellate advocacy as well as trial strategy. *Commonwealth v. Townsell*, 379 A.2d 98 (Pa. 1977). If we determine there was no reasonable basis for counsel's chosen course then appellant must demonstrate that counsel's ineffectiveness worked to his prejudice. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). Prejudice is established when an appellant demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. *Commonwealth v. Davis*, 541 A.2d 315 (Pa. 1988).

Appellant's claim of ineffectiveness requires that we first contemplate the admissibility of the expert witness's testimony which appellant asserts improperly bolstered the credibility of the victim. To properly analyze this claim we must consider the context within which the testimony occurred. Prior to the expert's testimony, Jimmy testified that during the year he resided at the Harley Hotel, appellant had anal and oral sex with him on at least ten occasions. (N.T. p. 21). On cross-examination, Jimmy admitted that he originally told Detective Hart that appellant had sex with him every day during the year Jimmy lived at the hotel. Jimmy admitted that the actual number of sexual encounters was 10, not 300. (N.T. p. 38). Jimmy testified that his first

sexual encounter was with his mother and father at age three. (N.T. p. 24-25). Jimmy told of other sexual encounters that also occurred when he was three, with former neighbors in a trailer park. (N.T. p. 24). Jimmy testified that he had frequent sexual encounters while residing at the Harley Hotel with men other than appellant. According to Jimmy, he would sit with his mother at the bar and drink three or four beers, until his mother told him to go to his room. (N.T. p. 43). Once in his room men would knock on the door, saying that his mom had sent them. Jimmy, and sometimes his younger brother, would disrobe, and the men would have sex with them. (N.T. 44-45). Jimmy admitted that although he had revealed this information to his foster parents, when Ms. Sobel first interviewed him he did not tell her that he had ever been the victim of sexual abuse. (N.T. p. 26).

Given the nature of the criminal charges at issue trial counsel pursued a defense strategy designed to attack Jimmy's credibility. Trial counsel was quite candid with the trial court in detailing his intention to discredit Jimmy by underlining the incredible nature of Jimmy's testimony and Jimmy's delay in reporting the abuse. Trial counsel intended to cross-examine Ms. Sobel on her complete reversal of opinion regarding whether or not Jimmy had been abused between her first and second interviews with Jimmy. The thrust of the defense strategy was to demonstrate that this child fooled an expert and therefore, he could easily fool the jury. (N.T. pp. 176-178).

Against this background the jury heard the following exchange when the Commonwealth presented Maddi-Jane Sobel, a clinical social worker, as an expert witness on child abuse:

Q. [by the prosecutor]: All right. Now could you tell the ladies and gentlemen of the jury why James Rosser didn't disclose to you, right away, the sexual abuse?

MR. BATEMAN [trial counsel]: Objection.

THE COURT: That's sustained.

Q.: Ms. Sobel, in cases of child sexual abuse, do children normally disclose, right away, incidents of child sexual abuse?

A.: No.

MR. BATEMAN: Objection. Move to strike.

THE COURT: Overruled.

BY THE COURT:
Q.: This particular area in which the questions are directed to, is this something that's within the common parameters of the average person, or are you testifying, now, based on your expertise in child abuse areas?

A.: In terms of my expertise, is the basis for which I have testified.

THE COURT: All right. I will allow you to ask the question generally.

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BY MR. MULLANEY [the prosecutor]
Q.: Generally speaking.

A. Children rarely disclose complete details at once. Depending upon the child's background, and the extent to which the abuse has occurred, depends upon the degree of disclosure that's gotten immediately. Most of the time, children who have been sexually abused, have been sexually abused over a long period, and they are then — what's called conditioned to accept the sexual abuse, and to also feel, on some level, that they participated in it, and it's referred to as a conditioning continuum. Given the conditioning continuum, and a chaotic background, in which the child has experienced loss of parents, frequent moves, any presence of alcohol or drug addiction, any times of unemployment or poverty, given those factors, the child is extremely unlikely to disclose, immediately, until a child is placed in an environment in which his or her nurturing and dependency needs are met, and in which the child is no longer in fear of any levels of repercussions from disclosure.

Most often, the disclosure occurs in steps, with the child disclosing things that permit the child to experience vulnerability. A child will not do that unless or until the child feels completely secure.

(N.T. pp. 105-107).

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Appellant argues that the sole purpose of this testimony was to enhance the credibility of Jimmy. According to appellant, Ms. Sobel's testimony explained to the jury that the delay in coming forth and the reluctance in revealing the abuse in his first interview, are factors consistent with child abuse; therefore by displaying these qualities, Jimmy is telling the truth about the abuse. Appellant concludes that by permitting this testimony to come in, the trial court invited the jury to abdicate its responsibility to determine Jimmy's credibility on the ultimate issue in the case. We agree.

This court has consistently maintained that expert testimony as to the veracity of a particular class of people, of which the victim is a member, is inadmissible. *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992) (expert testimony that the victim displayed behavior patterns consistent with those typically displayed by sexually abused children inadmissible); *Commonwealth v. Gallagher*, 547 A.2d 355 (Pa. 1988) (expert testimony that rape victim suffered from rape trauma syndrome and thus it was of no moment that she could not identify attacker two weeks after assault, yet was positive of his identity at trial inadmissible); *Commonwealth v. Rounds*, 542 A.2d 997 (Pa. 1988) (expert testimony that expert believed the victim was not lying when she told expert of sexual abuse inadmissible); *Commonwealth v. Davis*, 541 A.2d 315 (Pa. 1988) (expert testimony by child psychologist that children do not fabricate sexual experiences in child sex assault trial inadmissible); *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (expert testimony of pediatrician that eight year olds do not lie about sexual abuse in a case where victim was an eight year old boy inadmissible).

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Expert testimony is generally admissible in any case, where such testimony goes to a subject requiring special knowledge, skill or intelligence beyond that possessed by the ordinary juror. *Seese*, 517 A.2d at 921. A determination of whether or not a witness is telling the truth is a subject well within the ordinary knowledge and experience of the average juror. *Id.* at 922. In rejecting the need for expert testimony on the question of a witness' veracity, this court warned of the consequences, which would follow, should such expert testimony be permitted:

> For example, if testimony as to the veracity of various classes of people on particular subjects were to be permitted as evidence, one could imagine "experts" testifying as to the veracity of the elderly, of various ethnic groups, of members of different religious faiths, of persons employed in various trades and professions, etc. Such testimony, admitted as evidence, would encourage jurors to shift their focus from determining the credibility of the *particular* witness who testified at trial, allowing them instead to defer to the so-called "expert" assessment of the truthfulness of the class of people of which the particular witness is a member.

Seese, *Id.* Not only is testimony by an expert as to the credibility of any given victim/witness inadmissible for the reasons set forth in *Seese*, but the specific type of expert testimony at issue, describing general characteristics of child victims of sexual abuse, was rejected in *Dunkle* under the umbrella of "child sexual abuse syndrome" as failing to meet

the standard for the reliability of expert testimony established in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. 1923).[2]

Thus, given the consistent rulings of this court striking expert testimony of the type admitted in the instant case we find arguable merit to appellant's underlying claim. *Durst*. Next, we must consider whether trial counsel had a reasonable basis designed to effectuate appellant's interests in failing to preserve the objection to Ms. Sobel's testimony in post-trial motions. *Townsell*. At the post-conviction hearing on this matter, trial counsel did recall his intent to show the jury the inconsistencies between Ms. Sobel's first and second reports, and he did recall a concern with her being called as an expert witness rather than as a fact witness. (N.T. 5/17/97 p. 102). Trial counsel recalled the objection to the general testimony of Ms. Sobel as an expert, however, no explanation was offered for failing to raise this issue in post-trial motions.

The Superior Court found that counsel had a reasonable basis for failing to raise the issue of Ms. Sobel's testimony in post-trial motions. The Superior Court concluded that the claim would not have provided relief to appellant given the cautionary instructions the trial court gave the jury regarding the expert testimony of Ms. Sobel. (N.T. 101-102). Thus, it concluded that counsel had no reason to pursue a fruitless

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2. Although this court's opinion in *Dunkle* had not been published at the time of appellant's trial, the Superior Court opinion, which was affirmed on this point, was published at the time of appellant's trial. See, *Commonwealth v. Dunkle*, 561 A.2d 5 (Pa. Super. 1989).

exercise. We do not agree. To the contrary, we find that the cautionary instructions referred to by the Superior Court could not cure the impact of Ms. Sobel's expert opinion. The instructions referred to were given before the objectionable testimony was uttered, and the instructions merely iterated the general rule on expert opinion testimony. These instructions in no sense cautioned the jury to disregard the inadmissible testimony of Ms. Sobel as to the general characteristics of sexually abused children. *See Commonwealth v. Maloney*, 365 A.2d 1237 (Pa. 1976). Therefore, we do not find the Superior Court's analysis as to a reasonable basis for trial counsel's omission persuasive.

The Commonwealth asserts that trial counsel had a reasonable basis for failing to pursue this issue in post-trial motions for two reasons. First, the Commonwealth avers that the testimony was properly admitted given the state of the law at the time of appellant's trial; and second, that the trial strategy was to attack Jimmy's credibility via the inconsistent findings in Ms. Sobel's first and second reports regarding whether or not abuse had occurred. The Commonwealth attempts to support its first assertion by pointing to the fact that this court's decision in *Dunkle* had not been issued at the time of appellant's trial. As stated previously in this opinion, the testimony at issue was inadmissible under a long line of cases preceding *Dunkle*, and the Superior Court opinion in *Dunkle*, which was affirmed by this court in pertinent part, was available at the time of appellant's trial. This assertion is without merit.

Regarding the issue of trial strategy, the Commonwealth asserts that trial counsel knew that he would be opening the

door to this type of testimony when he cross-examined Ms. Sobel on the first report where she indicated no abuse had occurred. Thus, the Commonwealth argues, it was properly permitted to bring out on re-direct that Ms. Sobel changed her opinion after the second and third interviews with Jimmy. The initial error in the Commonwealth's argument here is that the testimony at issue was not brought out on re-direct as a response to the defense strategy. The prosecution on direct examination elicited the testimony regarding the general characteristics of sexually abused children, after an objection by trial counsel was overruled. (N.T. 105). Moving beyond the Commonwealth's misstatement as to when this testimony came in, we acknowledge that the Commonwealth is correct in its analysis of counsel's trial strategy. There is no doubt that an attack on Jimmy's credibility was trial counsel's strategy, and we agree that the strategy was reasonably intended to effectuate appellant's interests. Further, we acknowledge that counsel pursued this strategy knowing full well that by attacking the findings Ms. Sobel made in her initial report, the Commonwealth would rehabilitate her by reference to the second and third reports. In fact, trial counsel wanted the Commonwealth to admit all three reports as that further illustrated for the jury that Jimmy fooled the expert and could not be taken at face value as a witness. (N.T. 175-178).

However, we cannot agree that failure to preserve the objection to Ms. Sobel's expert testimony on the general characteristics of abused children, which testimony directly bolstered the credibility of Jimmy, was part of that strategy. If we would accept the Commonwealth's assertion, the fact that trial counsel made the objection at all is without rational

explanation. Further, by admitting the testimony at issue, the points defense counsel wanted to highlight regarding Jimmy's delay in reporting the abuse, and the fact that he originally convinced Ms. Sobel that he had not been abused, were completely undone. We do not agree with the Commonwealth's assertion that trial counsel intentionally omitted this meritorious claim from post-trial motions in keeping with the trial strategy of vitiating the credibility of the Commonwealth's primary witness. Rather, we find the admission of such damaging testimony by Ms. Sobel was in direct conflict with the designed strategy of showing the jury that Jimmy was not credible.

In *Davis*, and in *Rounds*, this court found trial counsel ineffective for failing to object to the inadmissible testimony of the expert witnesses called to bolster the credibility of the victims. In *Townsell*, this court held that failure to preserve an issue of arguable merit for appellate review constituted ineffective assistance of counsel. Given trial counsel's concern regarding Ms. Sobel's testimony as an expert witness, a concern reflected in the fact that he did object to her expert testimony and move to strike same, there can be no discernible reason for failing to preserve this issue in post-trial motions.

Finally, we must determine if counsel's failure has caused prejudice to appellant. The Commonwealth argues that appellant cannot meet this burden, as the other evidence at trial was sufficiently strong to establish that Jimmy had been abused. Here the Commonwealth points to the testimony of the physician, which revealed anal scarring and tightening of the sphincter muscle consistent with sexual

abuse. The Commonwealth also points to the details of the abuse revealed by Jimmy and related by him to his foster parents to support the claim that the abuse did occur. The fact that Jimmy was sexually abused is only one of the issues this jury had to resolve the other issue was whether or not appellant caused that abuse. By permitting Ms. Sobel to bolster the credibility of Jimmy, the jury was not only led to believe that abuse occurred, but also that appellant was the abuser. Only Jimmy's testimony related appellant to the crimes at issue. As trial counsel brought out in cross-examination of the Commonwealth witnesses, other persons identified by Jimmy as his sexual partners were not located. (N.T. 154-156). In addition, there was no physical or circumstantial evidence supporting the details Jimmy testified to regarding his sexual encounters with appellant. Jimmy had given statements and testified that appellant photographed him during sex and videotaped their encounters. When appellant was arrested and his apartment searched, no photographs, cameras, VCR equipment, or pornography was found. (N.T. 85). The Commonwealth's assertion that such overwhelming evidence of appellant's guilt was presented that appellant cannot establish prejudice by the admission of Ms. Sobel's expert testimony is not borne out by the record.

Abundant case law existed at the time of appellant's trial holding testimony such as Ms. Sobel's inadmissible. As this court stated in *Rounds* when addressing the prejudice prong of the ineffectiveness claim in that case, on this identical issue: "When an expert definitively testifies to the ultimate conclusion, as in this case, the improper admission of that evidence must by its very nature be so prejudicial as to

require a new trial." *Rounds*, 542 A.2d at 999. Accordingly, we find that appellant has demonstrated that trial counsel's failure to preserve the claim that Ms. Sobel's testimony was inadmissible caused appellant prejudice. *Pierce*. For the reasons stated herein, the decision of the Superior Court is reversed and the case is remanded to the trial court for a new trial.

Mr. Justice Saylor files a concurring opinion joined by Mr. Justice Zappala.

Madame Justice Newman files a dissenting opinion joined by Mr. Justice Castille.

JUDGMENT ENTERED:
February 24, 2000

s/ Shirley Bailey
Shirley Bailey, Chief Clerk

Appendix A

CONCURRING OPINION

MR. JUSTICE SAYLOR
DECIDED: February 24, 2000

I agree with the dissent that trial counsel's stated strategy of attacking the victim's credibility through the cross-examination of Ms. Sobel may be viewed as opening the door to some explanation on Ms. Sobel's part, and that the trial court issued a series of fairly specific limiting instructions in an attempt to prevent the jurors from improperly substituting Ms. Sobel's judgment for their own. However, I am unable to agree that Ms. Sobel's testimony was not offered to (and did not have the effect of) bolstering the child victim's credibility, or that trial counsel's strategy necessarily required that the Commonwealth be permitted to offer expert opinion to serve as a counterweight. Indeed, to allow testimony of the kind presented here simply because the defense elects to challenge the victim's credibility through the use of the victim's prior inconsistent statements would vitiate the evidentiary principles embodied in *Commonwealth v. Seese* and *Commonwealth v. Dunkle.*

I believe that adult witnesses confronted with delay and inconsistency in reporting by a child victim should be permitted to offer some explanation of the reasons for their own responsive actions or inaction. I also hold the view that the Commonwealth should be allowed to draw reasonable inferences from the evidence and thus suggest to the jury in closing argument that factors such as the child's age in comparison to the defendant's, the child's stage of intellectual and emotional development, and the nature of

the relationship between the child and the defendant may have affected the timing and character of the child's statements. Nevertheless, I believe that it simply goes too far to permit the Commonwealth, as it did here, to cloak such explanations and inferences with the authority of an expert opinion.

Accordingly, I join the majority in finding that trial counsel was ineffective in failing to preserve the pertinent issue for appellate review.

Mr. Justice Zappala joins this concurring opinion.

Appendix A

DISSENTING OPINION

MADAME JUSTICE NEWMAN
DECIDED: February 24, 2000

I dissent. The Majority finds that counsel for Peter Balodis (Appellant) was ineffective for failing to preserve objections to the testimony of Maddi-Jane Sobel (Sobel). I disagree. Pursuant to Pennsylvania law, counsel is presumed effective and the burden is with Appellant to prove otherwise. *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (1987). To do so, Appellant must show that his counsel had no reasonable basis in serving his client by making the chosen decisions during trial. *Id.* The test should not be whether he made the best available decision, but merely whether the decision is a reasonable one under the circumstances. *E.g.*, *Commonwealth v. DeHart*, 650 A.2d 38, 44 (Pa. 1994). Following a full review of the record, I cannot conclude that Appellant has proven that defense counsel was ineffective at trial or in post-trial motions. As more fully set forth below, I find that counsel had a rational basis for his actions; and they were reasonable based on the decisional law at the time in which this case was tried.

First, I disagree with the Majority's conclusion that by permitting the testimony of Sobel, the trial court invited the jury to abdicate its responsibility to determine the credibility of the child on the ultimate issue in this case. Rather, it is evident from a review of both the cross-examination of the child and of Sobel that the testimony was not used to bolster the testimony of either witness. Instead, defense counsel used the testimony of Sobel as an intentional trial strategy to

undermine the statements of the child and to show that Sobel initially did not believe that the child was abused. It was also used to set forth the many inconsistent and contrary statements that this child made to the authorities involved, including Sobel.

While it is true that the Commonwealth initially called Sobel as a witness, it was the defense, through his articulation of trial strategy to the court and in his cross examination of the child, that placed her reports into issue at trial.[1] Indeed, during the cross-examination of the ten-year-old boy, defense counsel questioned him at length regarding his conflicting stories of the abuse. (N.T. at 29-74.) Defense counsel raised the child's differing stories to the investigators, including Sobel, regarding the dates of the abuse, the number of other men involved in the abuse, and the location of the sexual acts at issue. (*Id.*) The boy admitted during this cross-examination that he told Sobel, in his first meeting with her in August of 1989, that "none of this happened to him." (N.T. at 52.)

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1. On direct examination Sobel testified as to the statements that appeared in her first report of August 1989, including that the child had denied any sexual abuse. She also was asked about the reasons why she re-interviewed the child in November of 1989 and in response detailed the claims of sexual abuse that the boy at that time reported. The assistant district attorney then questioned her regarding the reasons the child did not disclose to her in the first interview that he had been abused, but did so in the subsequent interviews (N.T. at 103-105.) In the course of this questioning, Sobel indicated that it was "normal" for children initially not to disclose incidents of abuse and gave a general description of children who have been sexually abused. (N.T. at 106-107) It was in this context that the testimony quoted by the Majority introduced at trial.

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The Majority makes much of the fact that defense counsel objected to one of the questions of the prosecution to Sobel and that this objection belies that counsel had as an intentional trial strategy to use Sobel's later testimony that the child had been abused. However, counsel's own cross-examination of Sobel and statements to the court *during* trial indicate that this was indeed his strategy.[2] In counsel's cross-examination of Sobel, he questioned her quite extensively about her interviews with the boy and asked her opinion regarding whether the child had been sexually abused. (N.T. 111) Further, the defense counsel continued to probe Sobel about her third interview with the child in February of 1990, an interview about which the Commonwealth had not even specifically addressed with Sobel. (N.T. 115-119). Moreover, counsel's own words *during the trial* show that his strategy was to elicit the opinion of Sobel regarding her assessment of the child. Counsel stated "*I fully intend to argue to the jury that she believed him . . . all three times — even though his stories, in my judgment, were different.*" (N.T. at 177) (Emphasis added). The court *even* made a point to note on the record that he admitted Sobel's testimony because of the request of defense counsel. The trial court stated:

> Ordinarily I would not allow that [Sobel's testimony] in. I allowed it in because of the fact that the defense — and *we discussed this* ***before*** we came into the room, **before *Maddi-Jane Sobel even took the stand*** — and *I only allowed her*

2. Trial counsel testified at the PCRA hearing that he "wanted the entire report in because I thought that would show more inconsistencies of the victim." (N.T., PCRA, 5/12/97, at 99).

> *opinion in because of the fact, from the Commonwealth's standpoint, because of the fact that* ***it had been brought in by the defense.*** I know you told me your trial strategy — and I can't disagree with it — but I think you ought to put that on the record, because it wasn't on the record before she testified.

(N.T. at 175-176.) (Emphasis added) The trial court had defense counsel place on the record that testimony of Sobel was introduced as his trial strategy. Defense counsel specifically indicated that he "took it upon himself to elicit that opinion testimony." (N.T. at 176.) Counsel further explained that the reasons he elicited the testimony was that at the first interview, the expert witness wrote a report indicating that she believed that the boy had not been sexually assaulted, and that it was only after the second and third interviews that the child had said he was abused. Defense counsel went on to state that:

> *I understood what I was doing — if I could place that on the record — that that would open the door for the Commonwealth to introduce her opinion as to the second and third interviews,* and *I fully intend to argue to the jury that she believed him . . . all three times — even though his stories, in my judgment, were different.*
>
> * * *
>
> And I will say, right now, that *I believe that was the correct strategy under the circumstances.*

(N.T. at 177-78) (Emphasis added)

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In addition, the trial court gave many cautionary instructions throughout the trial regarding the role of the jury in evaluating the testimony of Sobel. Before Sobel testified, the trial court instructed the jury that "she is permitted to testify first as a fact witness, as to some of the facts that occurred and second, she is also permitted to tell you about manifestations of sexual abuse in children generally." (N.T. at 102.) Later, the court instructed the jury:

> There was a question asked by defense counsel, with respect to the first report, and an opinion was requested. I will allow you [the prosecutor] to ask whether or not that opinion has changed, but again, I am emphasizing that her opinion is not what's important. The only person that can determine whether or not there was a child abuse situation here is you, and you have to determine who did it. You are the ones who make that decision.

(N.T. at 123.) Then, in its charge to the jury the trial court instructed:

> I want to make a special comment about Maddi-Jane Sobel's testimony. I believe I mentioned this before, but I want to mention it again. During the course of the direct examination, questions were asked, relating to whether or not she believed that [the child] had been sexually abused. That opinion which was rendered cannot be considered by you as substantive evidence and cannot be considered by you as opinion evidence on her behalf. You

> are the people who have to decide the issue. That's the real issue here whether or not he was abused, and by whom. You have to decide that issue.

(N.T. at 224-25)

Second, I disagree with the Majority's conclusion that the strategy of the trial counsel was not reasonable given the law in September of 1990. Indeed, the jurisprudence in this area was such that the Superior Court had interpreted our decisions in *Seese*, *Davis*, *Gallagher* and *Rounds* to mean that an expert's testimony exceeds permissible bounds only if the expert specifically commented upon the veracity or credibility of the victim. However, testimony regarding the general behavioral and psychological characteristics of sexual abuse victims was admissible. *E.g.*, *Commonwealth v. Cepull*, 568 A.2d 247 (Pa. Super. 1990); *Commonwealth v. McIlvaine*, 560 A.2d 155 (Pa. Super. 1988); *Commonwealth v. Baldwin*, 502 A.2d 253 (Pa. Super. 1985); *Commonwealth v. Pearsall*, 534 A.2d 106, 108 n. 1 (Pa. Super. 1987). These decisions certainly left open the conclusion that Sobel's testimony was admissible if not used for the purpose solely to sustain the credibility of the victim.

In particular, on January 3, 1990, only a few months before the trial at issue here, the Superior Court in *Cepull*, *supra*, specifically held that a "generalized description of rape trauma syndrome" did not conflict with the holding of this Court in *Seese* and did not "improperly enhance the victim's credibility." 568 A.2d at 248-49. *See also Commonwealth v. Stonehouse*, 555 A.2d 772, 782 (Pa. 1989) (expert testimony regarding general characteristics of

victim's psychological and physical abuse is admissible.) Because our decisions at the time did not specify that expert testimony regarding the general characteristics of an abused victim would be *per se* inadmissible, and because the Superior Court had clearly held that such generalized testimony was admissible, I would find that trial counsel's strategy was eminently reasonable.

Finally, I disagree with the Majority's conclusion that the testimony of Sobel, assuming it was inadmissible, caused prejudice to Appellant. I believe that the evidence at trial was sufficiently strong to establish that the child had been abused. In particular, the testimony of the pediatrician revealed anal scarring and tightening of the sphincter muscle consistent with sexual abuse and the details of the abuse revealed by the boy and related by him to his foster parents support the claim that the abuse did occur. The child steadfastly identified Appellant as one of his abusers and did not waver from this testimony despite his age and the fact that he was subjected to extensive cross-examination. As set forth above, I do not agree that the testimony of Sobel was used to bolster the credibility of the child. In fact, defense counsel used it in just the opposite manner and yet the jury concluded that Appellant did indeed rape and sodomize this child on repeated occasions. This case is not like *Seese*, *Rounds* or *Davis* where the expert gave testimony directly commenting on the truthfulness of the victim and I would accordingly affirm the decision of the Superior Court.

Mr. Justice Castille joins this Dissenting Opinion.

APPENDIX B — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED SEPTEMBER 24, 1998

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 442 M.D. Allocatur Docket 1998

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

PETER BALODIS,

Petitioner

Petition for Allowance of Appeal
from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 24th day of September, 1998 the petition for allowance of appeal is **GRANTED** limited to the issue of whether trial counsel was ineffective for failing to preserve trial objections to the expert witness's bolstering of the alleged victim's credibility in his written post-trial motions, thereby waiving the issue for appeal.

APPENDIX C — MEMORANDUM AND JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED MAY 8, 1998

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2840 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PETER BALODIS,

Appellant

Appeal from the Judgment of Sentence in the
Court of Common Pleas of Montgomery County,
Criminal Division, No. 162-90

BEFORE: TAMILIA, ORIE MELVIN and BECK, JJ.

MEMORANDUM: FILED MAY -8 1998

Peter Balodis appeals from the April 5, 1991 judgment of sentence imposing an eleven (11) to twenty-four (24) year term of imprisonment. Following a September 1990 jury trial, appellant was convicted of involuntary deviate sexual intercourse,[1] statutory rape[2] and corruption of a minor.[3] Over

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1. 18 Pa.C.S. § 3123.

2. ***Id.***, § 3122, repealed March 31, 1995 and replaced by section 3122.1, **Statutory Sexual Assault.**

3. ***Id.***, § 6301.

the course of nine months, while the victim, a nine-year-old boy, and the victim's mother resided at appellant's "hotel", appellant repeatedly raped the victim, who was supplied alcohol from the hotel bar and instructed by his own mother to comply with appellant's sexual demands. Appellant filed a direct appeal which was dismissed by this Court on August 24, 1992 for failure to file an appellate brief. Appellant then filed a Post Conviction Relief Act (PCRA) petition pursuant to 42 Pa.C.S. § 9541 *et seq.*, seeking reinstatement of his right to a direct appeal. By Order dated June 23, 1997, the PCRA court granted appellant's petition to this appeal, nunc pro tunc, finding appellate counsel to have been ineffective in failing to file a timely appellate brief. Accordingly, this appeal followed.

Appellant raises the following two ineffective assistance of counsel challenges.

I. Was trial counsel ineffective because he failed to preserve his timely trial objections to expert witness Sobel's bolstering of the alleged victim's credibility in his written post trial motions, waiving the issue for appeal?

II. Was trial counsel ineffective for failing to call any of several character witnesses who were available to testify that appellant had a good reputation for being nonviolent?

(Appellant's Brief, p. 7.)

The standard by which this Court reviews ineffective assistance of counsel claims is well settled.

Appendix C

> 'The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be considered ineffective for failing to assert a meritless claim. Once this threshold is met we apply the "reasonable basis," test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the appellant because counsel's stewardship of trial is presumptively effective.'

Commonwealth v. Rovinski, 704 A.2d 1068, 1071 (Pa. 1997), *quoting* ***Commonwealth v. Pierce***, 537 Pa. 514, 522-26, 645 A.2d 189, 194-95 (1994).

Appellant first claims trial counsel was ineffective due to his failure to challenge the testimony of a Commonwealth expert witness, Maddi-Jane Sobel, in post-trial motions resulting in waiver of the issue on direct appeal. At trial, defense counsel objected several times during the cross-examination of Sobel. His objection to questioning regarding the victim's delay in reporting was sustained by

the court (T.T., 9/11/90, p. 105). His objections to Sobel's expert opinion regarding typical disclosure of sexual abuse by child victims and the typical background of child victims were overruled. The court explained to the jury prior to the witness's testimony:

> In deciding whether or not to accept Ms. Sobel's testimony, you should consider the evidence as to her training, education, and experience, as well as the reasons and facts on which her opinion is based. Also, in deciding whether or not to accept her opinion, you should bear in mind that you are not bound to accept it, merely because it is the testimony of someone having special knowledge or skill.
>
> The one thing I want you to understand specifically, in this particular case, is the issue of, whether or not child abuse occurred in this case is totally within your parameters. Ms. Sobel will not be permitted to give testimony as to whether or not, in her opinion, she thinks that sexual abuse occurred or did not occur.
>
> She is not allowed to do that. However, as an expert, she is permitted to testify, number one, as a fact witness, as to some of the facts that occurred, and, number two, she is also permitted to tell you about the manifestations of sexual abuse in children generally, but not — whether or not you think those manifestations occurred in this case, however, is totally up to you to decide.

Appendix C

> She is here to give you a background of child abuse, to a limited extent, so that you can have a full knowledge of the manifestations of child abuse, and then, whether or not you accept that testimony, and whether or not you accept her special training, and whether or not you apply it to this case, is totally up to you to decide.

(***Id.***, pp. 101-102.)

We find no reasonable basis for re-asserting the objections to Sobel's testimony as the evidence properly was limited to only those matters within the scope of the witness' expertise. The jury was clearly directed that the opinion of the expert on the abuse of the child was not to be determinant of that abuse, but they were to consider only such credible evidence as derived from the child and other relevant sources. Counsel cannot be deemed ineffective for failing to raise a claim without merit. ***Commonwealth v. Fahy***, 537 Pa. 533, __, 645 A.2d 199, 202 (1994).

Next, appellant argues trial counsel's failure to call available character witnesses to testify as to his reputation for peacefulness constitutes ineffective assistance of counsel. We disagree. Our Supreme Court, in reviewing cases such as this where the credibility of witnesses is of paramount importance, has found evidence of good character to be substantive and potentially sufficient to create reasonable doubt of a defendant's guilt. ***Commonwealth v. Weiss***, 530 Pa. 1, 606 A.2d 439 (1992). Challenges to the failure to call character witnesses in cases similar to this case, therefore, have been found to be of arguable merit.

Appendix C

As clarified in ***Commonwealth v. Blount***, 538 Pa. 156, 647 A.2d 199 (1994), ***Weiss, supra***, does not purport to say the failure to call available character witnesses regardless of the circumstances is ineffectiveness per se. ***Blount, supra*** at __, 647 A.2d at 207. In order to demonstrate ineffective assistance, appellant must show the decision to forego character evidence was not reasonably designed to effectuate his interests and the absence of said evidence was prejudicial to him. Upon examination of the PCRA hearing transcript, it is apparent, however, the course of action likely to be prejudicial to appellant would have been the introduction of the character evidence.

Evidence of a defendant's bad character is not admissible in a criminal case unless the defendant first places it at issue. ***Commonwealth v. Stilley***, 455 Pa. Super. 543, __, 689 A.2d 242, 251 (1997).

At time of trial, appellant had two Liquor Control Board (LCB) violations for which adjudications were pending. At the PCRA hearing, trial counsel explained his concern regarding potential cross-examination into this area. In an attempt to negate this explanation, appellant relies upon the rule of law barring the use of unadjudicated criminal charges to refute good character evidence. ***Commonwealth v. Scott***, 496 Pa. 188, 436 A.2d 607 (1981).

Appellant fails to recognize, however, the likelihood of cross-examination into the subject matter of those violations irrespective of and without reference to the criminal citations. The record reveals the LCB violations dealt with the lewd and licentious conduct which occurs in appellant's establishment

in addition to appellant's furnishing of alcohol to minors. Both of these matters would have been introduced during cross-examination of appellant's character witnesses to refute appellant's reputation in the community for peaceableness and good character. In light of the evidence of abhorrent sexual abuse in this case and the victim being served alcohol until he was "dizzy" prior to being sexually abused, counsel's decision to omit character evidence to avoid this sort of devastating cross-examination was clearly designed to effectuate appellant's interests. We find counsel's decision to have been reasonable under the circumstances and appellant's arguments, therefore, fail to establish ineffective assistance.

Based upon the foregoing, appellant's April 5, 1991 judgment of sentence is affirmed.

Judgment of sentence affirmed.

Appendix C

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2840 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PETER BALODIS,

Appellant

Appeal from the Judgment of Sentence in the
Court of Common Pleas of Montgomery County,
Criminal Division, No. 162-90

BEFORE: TAMILIA, ORIE MELVIN and BECK, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of MONTGOMERY *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: MAY 8, 1998

APPENDIX D — OPINION OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED SEPTEMBER 19, 1997

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 162-90

COMMONWEALTH OF PENNSYLVANIA

v.

PETER BALODIS

OPINION

TRESSLER, J. SEPTEMBER 19, 1997

Defendant appeals pursuant to this court's order dated June 23, 1997, granting his request to appeal nunc pro tunc. Defendant was convicted of involuntary deviate sexual intercourse, statutory rape, and corruption of the morals of a minor on September 12, 1990. Trial counsel filed and argued post trial motions, which this court denied February 11, 1991. New counsel entered his appearance to perfect a timely appeal, but on August 24, 1992, the Superior Court dismissed defendant's appeal for failure to timely file his appellate brief.

Defendant then filed a petition under the Post Conviction Relief Act alleging ineffectiveness of both trial and appellate counsel, and requesting allowance to appeal nunc pro tunc.

Appendix D

This court concluded that appellate counsel was ineffective in failing to file a brief, and did not address the issue of whether trial counsel was ineffective. This court granted the request to appeal nunc pro tunc solely on the basis of appellate counsel's representation. Defendant, through new appellate counsel, then filed this timely appeal.

All factual allegations supporting defendant's claims of ineffective assistance of counsel are contained in the record. Therefore, this court has refrained from addressing or deciding defendant's claims other than his request to appeal nunc pro tunc, as required by *Commonwealth v. Miranda*, 296 Pa. Super. 441, 442 A.2d 1133 (1982), and files this opinion in satisfaction of its duties under Pa.R.A.P. 1925 and *Miranda*.

BY THE COURT,

s/ Paul W. Tressler
Paul W. Tressler, Judge